

State v. Huffman, 222 Ariz. 416, 215 P.3d 390 (App. 2009): The defendant was convicted of several crimes after two mistrials caused by hung juries. He moved for dismissal before the third trial, but the trial court denied the motion. On appeal, he argued that the principles of double jeopardy forbade a third trial. In addressing the double jeopardy claim, the Court of Appeals provided some insight into Rule 16.6(d).

After quoting the Rule and giving the general outlines of the case law applying it, the court noted that “[t]he majority of the cases that have analyzed Rule 16.6(d) have done so in the context of speedy trial violations.” *Id.* at 420, ¶ 11, 215 P.3d at 394. In those cases, “the interests of justice require dismissal with prejudice only when the prosecutor has delayed in order to obtain a tactical advantage or harass the defendant and the defendant has demonstrated resulting prejudice.” *Id.*

The court then quoted the comment to the original version of the Rule, that a court ought to consider “‘the additional expense, prejudice and anxiety’ experienced by a defendant waiting for reprosecution.” *Id.* at 420-21, ¶ 12, 215 P.3d at 394-95. That comment was deleted when the Rule was amended, but “the idea that the interests of justice require balancing the defendant’s interests against the state’s has survived” in case law. *Id.* Thus, the court continued, “trial courts have always had both the flexibility to weigh the competing interests of the state and the defendant and been provided the authority and discretion to dismiss charges with prejudice when it would be unfair to allow the prosecution to continue.” *Id.*

How do we handle it on appeal?

We can appeal a dismissal with prejudice.

An appeal may be taken by the state from:

1. An order dismissing an indictment, information or complaint or count of an indictment, information or complaint.

A.R.S. § 13-4032(1).

There were some cases that said we had to raise this by special action, but those cases were decided before the current statute. *State v. Schneider*, 135 Ariz. 387, 389, 661 P.2d 651, 653 (App. 1982). The State may appeal “from an order to dismiss that [goes] beyond what the state requested.” If we ask for dismissal without and the court dismisses with, “[t]he state [is] aggrieved by the order and may appeal it.” *State v. Gilbert*, 172 Ariz. 402, 404, 837 P.2d 1137, 1139 (App. 1991).

The standard of review is abuse of discretion. But remember that an error of law is an abuse of discretion. As the Court of Appeals said: “We review an order granting a motion to dismiss criminal charges for an abuse of discretion or for the application of an incorrect legal interpretation.” *State v. Lemming*, 188 Ariz. 459, 460, 937 P.2d 381, 382 (App. 1997).



Issues in Intellectual Disability in Capital Cases Presented by Jacob R. Lines March 28, 2014

The purpose of this presentation is to give some background about intellectual disability in capital cases and to describe what is on the horizon, starting with our statute and continuing through several recent cases.

A.R.S. § 13-753

In 2001, the Legislature enacted a statute saying that, after the effective date of the statute, no intellectually disabled defendant could be sentenced to death. The statute defines intellectual disability as “a condition based on a mental deficit that involves significantly subaverage general intellectual functioning, existing concurrently with significant impairment in adaptive behavior, where the onset of the foregoing conditions occurred before the defendant reached the age of eighteen.” A.R.S. § 13-753(K)(3). “Significantly subaverage general intellectual functioning” means an IQ score of 70 or lower, A.R.S. § 13-753(K)(5), and “adaptive behavior” is defined as “the effectiveness or degree to which the defendant meets the standards of personal independence and social responsibility expected of the defendant’s age and cultural group.” A.R.S. § 13-752(K)(3).

As our supreme court later explained,

[The statute] involves several steps in which experts examine a capital defendant “using current community, nationally and culturally accepted physical, developmental, psychological and intelligence testing procedures, for the purpose of determining whether the defendant has mental retardation.” The experts submit reports and the trial court holds a hearing at which the defendant bears the burden of proving mental retardation by clear and convincing evidence. A finding by the trial court of mental retardation prohibits the imposition of the death penalty.

State v. Grell, 205 Ariz. 57, 63, ¶ 39, 66 P.3d 1234, 1240 (2003).

Atkins v. Virginia

The next year, in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court held that the Eighth Amendment prohibits the execution of intellectually disabled persons. It arrived at this conclusion based on a “national consensus,” found in state statutes, that intellectually disabled persons are “categorically less culpable than the average criminal” and more vulnerable to wrongful execution. *Id.* at 315-21. According to the Court, “[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded.” *Id.* at 317. In footnote 3 of its decision, the Court quoted clinical definitions of mental retardation from the APA’s DSM-IV and the American Association on Mental Retardation. The Court left “to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences,” noting that “statutory definitions of mental retardation” in states that legislatively had prohibited execution “are not identical, but generally conform to the clinical definitions” promulgated by the APA and the AAMR. *Id.* at 317 & n. 22, quoting *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986).

State v. Grell, parts I-III

Shawn Grell took his two year old daughter to the desert, poured gasoline on her, and lit her on fire. He was convicted of first-degree murder and sentenced to death. Atkins was decided after his sentencing and section 13-753 did not take effect until after he was sentenced. On appeal (*Grell I*), our supreme court affirmed the conviction but remanded the case for the trial court to determine whether Grell was intellectually disabled. *State v. Grell*, 205 Ariz. 57, 64, ¶ 42, 66 P.3d 1234, 1241 (2003). In doing so, it instructed the court to follow the procedures set out in section 13-753. *Id.* It also noted in footnote 4 that our statute “appears to comport substantively and procedurally with the principles set forth in *Atkins*.” *Id.* n.4.

On remand, the trial court found that Grell failed to establish by clear and convincing evidence that he was intellectually disabled. Our supreme court affirmed that finding and addressed several issues about the statute in *State v. Grell*, 212 Ariz. 516, 135 P.3d 696 (2006) (*Grell II*). It ruled that it was constitutional to place the burden on a defendant to prove intellectual disability by clear and convincing evidence, noting that the Supreme Court deferred to the states to develop appropriate procedures to implement *Atkins*. *Id.* at 521-25, ¶¶ 21-41, 135 P.3d at 701-05. It also held that the determination of intellectual disability need not be made by a jury. *Id.* at 525-27, ¶¶ 42-49, 135 P.3d at 705-07.

The court also addressed the difference between the DSM-IV and our statute. Grell argued that he clearly showed that he had “deficits in two of the eleven areas listed in the DSM-IV and therefore has mental retardation.” The court explained that, while the DSM-IV definition of intellectual disability is similar to the statutory definition, it is not the same because “[t]he statute requires an overall assessment of the defendant’s ability to meet society’s expectations of him. It does not require a finding of mental retardation based solely on proof of specific deficits or deficits in only two areas.” *Id.* at 529, ¶ 62, 135 P.3d at 709. The court vacated the death sentence and remanded the case to the trial court for a resentencing by a jury.

In a separate opinion, Justice Bales argued that the clear and convincing standard was unconstitutional and that a defendant need only show intellectual disability by a preponderance of the evidence.

After a jury imposed the death penalty, the case came back to our supreme court on appeal. *State v. Grell*, 231 Ariz. 153, 291 P.3d 350 (2013) (*Grell III*). Because the murder happened before August 1, 2010, the court “independently review[ed] the propriety of the death sentence.” *Id.* at 154, ¶ 3, 291 P.3d at 351.

The court examined the evidence closely, without deferring to the jury. It also applied the preponderance of the evidence standard found in section 13-751(C). *Id.* at 155, ¶ 10, 291 P.3d at 352. After examining the record, the court found that Grell had “proved by a preponderance of the evidence that he has a disorder involving ‘significantly subaverage general intellectual functioning’ coupled with significant deficits in adaptive behavior that manifested before age eighteen, and thus that he has mental retardation.” *Id.* at 160, ¶ 35, 291 P.3d at 357. Based on this finding, the court vacated the death sentence and imposed a sentence of natural life in prison. *Id.*, ¶ 36.

In a concurring opinion, Justice Bales raised some questions that defendants will certainly raise. First, he maintained his view that a defendant need only show intellectual disability by a preponderance of the evidence. *Id.* at 160-61, ¶ 38, 291 P.3d at 357-58. He then noted that Grell presented “extensive additional evidence” of intellectual disability after the pretrial

screening. That, he reasoned, could be good cause for a trial court to reconsider the pretrial determination under Rule 16.1(d). *Id.* at 161, ¶ 39, 291 P.3d at 358. He then noted that the statute establishes the clear and convincing standard for pretrial screenings but that section 13-753(F) allows a defendant to present evidence of intellectual disability during the penalty phase. *Id.*, ¶ 40.

He also claimed that “the Court’s decision today recognizes that a finding of mental retardation by a preponderance precludes a death sentence.” *Id.*, ¶ 41. In light of that, he opined that “courts will need to address how to assure that a fact finder (whether the trial court or the jury) considers whether a defendant has proved mental retardation by a preponderance standard.” *Id.*

***Williams v. Cahill*, 232 Ariz. 221, 303 P.3d 532 (App. 2013), review denied (Nov. 26, 2013).**

Williams is charged with two counts of first degree murder, and the State filed a death notice. In accordance with A.R.S. § 13-753(B), the trial court appointed a “prescreening psychological expert” to evaluate Williams’s IQ. That expert found that his IQ was less than 75, so the trial court appointed additional experts and set an evidentiary hearing to determine whether Williams was intellectually disabled. After the hearing, the trial court found that Williams proved his significantly sub-average intellectual functioning. But it found that he did not prove either that he had significant adaptive behavior impairment or that the onset of the conditions happened before he turned 18. Williams filed a petition for special action under A.R.S. § 13-753(I). That subsection says that the defendant can file a special action on this question and the Court of Appeals has to decide it on its merits.

Williams began as a simple special action because it was just challenging the trial court’s findings of fact, and appellate courts will not disturb a trial court’s factual findings unless they are clearly erroneous or unsupported by any reasonable evidence. We argued that the trial court’s findings were reasonable and were supported by the record, so Williams couldn’t show that they were clearly erroneous.

Then came the orders for supplemental briefing. The court asked us to brief the following questions:

What, if any, effect did *Grell III* have on the issues raised in this special action?

Does the statutory definition for “intellectual disability” comply with the Eighth Amendment to the extent that the definition for determining “significant impairment in adaptive behavior” deviates from the accepted clinical definitions set forth in footnote 3 of *Atkins*? Has the Arizona Supreme Court already resolved this issue?

After considering the supplemental briefing, the court issued its opinion. First, the court set forth the standard of review: whether the trial court “clearly erred” in finding that Williams failed to prove intellectual disability by clear and convincing evidence, deferring to the trial court’s determination if “reasonably supported by evidence.” *Id.* at 226, ¶ 14, 303 P.3d at 537. The court then reviewed the record and held that the trial court did not err in finding that Williams failed to prove he had significantly subaverage intellectual functioning before the age of eighteen. *Id.* at 230, ¶ 30, 303 P.3d at 541. It then rejected Williams’s arguments about the trial court’s findings related to impairment in adaptive behavior. *Id.* at 230-31, ¶¶ 31-36, 303 P.3d at 541-42.

Most interesting for future cases was the majority's response to the dissent's argument that a court must use clinical definitions of intellectual disability rather than the statutory definition.

First, the court held that our supreme court considered and rejected that argument in *Grell II*. In that case, the defendant argued that he was mentally retarded under the DSM-IV definition. The supreme court declined to use that definition and relied instead on the statutory definition. *Id.* at 231, ¶ 38, 303 P.3d at 542. Our supreme court, the Court of Appeals explained, "appears to have interpreted *Atkins* as 'leaving the definition of mental retardation to the states,' such that the prohibition against executing the mentally retarded 'depends on the state's definition of mental retardation.'" *Id.* at 232, ¶ 39, 303 P.2d at 543, quoting *State v. Roque*, 213 Ariz. 193, ¶ 149, 141 P.3d 368, 402 (2006).

Second, the court rejected the argument that the *Atkins* court adopted clinical definitions of mental retardation, noting that "[t]he Supreme Court itself has stated that *Atkins* 'did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation 'will be so impaired as to fall [within *Atkins*' compass]' but left enforcement of the constitutional restriction to the states.'" *Id.*, ¶ 40, quoting *Bobby v. Bies*, 556 U.S. 825, 831 (2009); quoting *Atkins*, 536 U.S. at 317 (emphasis added).

Third, it noted that our statute was among those that the *Atkins* court relied on to find a consensus against executing the mentally retarded. Thus, the Court signaled that Arizona had established an appropriate way to enforce the constitutional restriction by adopting a definition of mental retardation that "generally conform[s]" to clinical standards. *Id.*, ¶ 40, quoting *Atkins*, 536 U.S. at 317, n. 22.

Fourth, the court agreed with the State that "requiring strict adherence to clinical standards could create some instability in this area of the law" because clinical standards change over time and the Court defers to legislatures in dealing with policy questions such as this. *Id.* at 232-33, ¶ 41, 303 P.3d at 543-44.

The Arizona Supreme Court denied review on this case. Because the case raised such big questions that could affect many capital cases in Arizona, I think they would have granted review if they had any doubts about the correctness of the decision. This may be one of those cases in which the denial of review actually means that the court approved of the decision.

Continuing questions

Because our supreme court did not grant review and render a decision in *Williams*, defense lawyers will continue to raise the arguments articulated in Judge Eckerstrom's dissent.

There are also the lingering questions raised by Justice Bales's opinion in *Grell III*. There is at least one case pending before the supreme court that addresses the question of whether a trial court erred by instructing a jury in the penalty phase of a capital case that, if they found that the defendant was intellectually disabled by a preponderance of the evidence, they must vote for a life sentence. In that case, the State argues that the trial court hears evidence of intellectual disability as a legal bar to execution in the pretrial screening procedure and the jury hears evidence of intellectual disability as mitigation, so the judge was incorrect in telling the jury that they should vote for life if they found intellectual disability.



Rule 702

Presented by Jacob R. Lines
March 28, 2014

How does it come up?

Some examples from Pima County:

Testimony about the drug trade, to show that possession was for sale, or to defeat a mere presence defense.

Testimony from an arson investigator about the cause and origin of a fire or explosion.

Testimony about cell towers and location of a cell phone at a given time.

How do you handle it at trial?

Of course, we start with the Rule:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Ariz. R. Evid. 702. Then we look for federal cases that deal with our issue, because "[w]e construe the new Arizona rule in accordance with its federal counterpart" and look to federal court decisions as persuasive authority. *ASH/ACPTC v. Klein*, 231 Ariz. 467, 473, ¶ 26, 296 P.3d 1003, 1009 (App. 2013).

Example One, in which we lost:

We indicted the defendant for arson and other crimes for a fire that engulfed his business and damaged others. He was the one person at the scene right before the fire started and he had lots of financial burdens that would be eased by an insurance payout. There was one question in the case – was the fire set intentionally? Proving this depended on our experts.

The defendant challenged the testimony of our two arson investigators under Rule 702. The investigators, one from the local fire department and one from the ATF, were both experienced and trained and had both been allowed to testify as experts in arson cases before. The trial court agreed with the State that the experts were "qualified as an expert by knowledge, skill, experience, training, or education." It also agreed that the investigators' opinions were relevant because they would help the jury understand the evidence. It rejected some of the defendant's other arguments. For example, it ruled that the experts' failure to review the entire 17,000-page file went to weight and credibility, not admissibility. It also ruled that peer review was not necessary for the testimony to be admissible because *Daubert* is flexible on that factor.

The main challenge was whether the experts had reliably applied reliable principles and methods to the case. What turned out to be the problem with this was the investigators' application of the authoritative guidelines for arson investigation to the case.

The parties stipulated that fire investigations are subject to the National Fire Protection Association's manual titled NFPA 921. Many courts have recognized NFPA 921 as a reliable methodology for evaluating testimony under Rule 702. NFPA 921 is the main reference for scientific-based investigation and analysis of fires and explosions. Investigators use it as a guide for rendering opinions about origin, cause, and responsibility for fires. It is intended to establish a framework for effective origin and cause analysis and ensure that investigators use accepted scientific principles.

Of major interest is NFPA 921's insistence on using the scientific method objectively in a systematic way. NFPA 921 was updated in 2011, after the investigation in this case. One of the changes in the 2011 version was the rejection of the concept of "negative corpus." Negative corpus "is fire investigator shorthand for the determination that a fire was incendiary based on the lack of evidence of an accidental cause." *Schlesinger v. United States*, 898 F. Supp. 2d 489, 491-92 (E.D.N.Y. 2012). NFPA 921 defines it as "[t]he process of determining the ignition source for a fire, by eliminating all ignition sources found, known, or believed to have been present in the area of origin, and then claiming such methodology is proof of an ignition source or which there is no evidence of its existence". NFPA 921, § 18.6.5 (2011).

The 2011 edition of NFPA 921 explicitly rejects the use of negative corpus:

This process is not consistent with the Scientific Method, is inappropriate, and should not be used because it generates untestable hypotheses, and may result in incorrect determinations of the ignition sources and first fuel ignited. Any hypotheses formulated for the causal factors (e.g., first fuel, ignition source, and ignition sequence), must be based on facts. Those facts are derived from evidence, observations, calculations, experiments, and the laws of science. Speculative information cannot be included in the analysis.

Id. NFPA 921 goes on to direct that if "all hypothesized fire causes have been eliminated and the investigator is left with no hypothesis that is evidenced by the facts of the investigation, the only choice for the investigator is to opine that the fire cause, or specific causal factors, remains undetermined." NFPA 921, §18.6.5.1 (2011). It does not allow hypotheses based "on the absence of any supportive evidence. . . . That is, it is improper to opine a specific ignition source that has no evidence to support it even though all other hypothesized sources were eliminated. *Id.*

Thus, NFPA 921 still allows an investigator to conclude that something caused a fire even if physical evidence of that thing no longer exists, by use of other evidence to deduce the origin and cause. Negative corpus is only inappropriate when there is no evidence from which deductions can be made.

We argued mightily about this. We explained why the testimony was admissible under Rule 702. In the end, the trial court had some quibbles about the investigators' work in the case, but it boiled down to negative corpus. The trial court characterized the investigators' deductive reasoning and use of the process of elimination as negative corpus and thus ruled

that they did not follow NFPA 921 and did not reliably apply the principles and methods to the case.

So, what went wrong?

Why no special action?

Example Two, in which we won:

In this case, the defendant and others were charged with murder. Part of the evidence was that defendant's and co-defendant's cell phones had used a cell tower close to where the victim's body was buried. We had a police witness to testify about the general operation of cellular telephone networks and the location of the towers that the defendant's phone used in relation to the victim's burial site. She would not estimate the location from which the defendant made any phone calls or sent any text messages. The defendant moved to preclude the testimony under Rule 702, arguing that the witness should not be able to testify as to exact locations based on the cell phone records.

We responded that her testimony was admissible under Rule 702. First, we argued that she was qualified as an expert. The witness had worked in cellular tower and phone analysis for seven years. She had taken basic and advanced classes in using the computer program that TPD uses for cellular information analysis. Most of her experience "has been on the job with experienced analysts who have been doing this for many years."

We then noted that, while some of the *Daubert* factors appear more suited to scientific expert testimony, they do not preclude the admission of expert testimony based on training and experience such as testimony about the general principles of cellular tower operation. In particular, we quoted the Advisory Committee Notes on the 2000 amendment to federal Rule 702:

Nothing in this amendment is intended to suggest that experience alone - or experience in conjunction with other knowledge, skill, or education - may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.

Both parties relied on *United States v. Evans*, 892 F. Supp. 2d 949 (N.D. Ill. 2012), and *United States v. Jones*, 918 F. Supp. 2d 1 (D.D.C. 2013).

In *Evans*, the government sought to present testimony from an FBI agent about the operation of cellular networks and the location of the defendant's cell phone during the crime. The agent explained how he could determine the location of a cell phone using the theory of "granulization." He first identifies (1) the physical location of the cell sites used by the phone during the relevant time period, (2) the specific antenna used at each cell site, and (3) the

direction of the antenna's coverage. He then estimates the range of each antenna's coverage based on the proximity of the tower to other towers in the area. This is the area in which the cell phone could connect with the tower given the angle of the antenna and the strength of its signal. Finally, using his training and experience, the agent predicts where the coverage area of one tower will overlap with the coverage area of another. Applying this methodology, the agent could estimate the general location of the phone.

The *Evans* court first found that the agent was qualified based on his extensive training and experience. It then ruled that the testimony about how cellular networks operate was admissible under Rule 702. It would allow the jury to narrow the possible locations of the defendant's phone during the crime. It was reliable because of the agent's extensive training and the time he spent analyzing cell site records. The court also noted that the testimony fit the facts of the case, since a phone registered to defendant used certain cell towers to place a number of calls during the course of the crime.

But the court did not allow the agent to testify about using a theory of "granulization" to estimate the range of certain cell sites based on a tower's location to other towers and predict coverage overlap, and the estimated range of coverage for each of the towers indicated on a summary exhibit. The agent testified that he and other agents had used the theory with a zero percent rate of error. The court found it unreliable because there were other factors that could have caused defendant's phone to connect to one of the towers even though another tower was closer to him and the agent did not fully account for those factors in his analysis. In addition, the agent didn't present any scientific calculations concerning the coverage area, and the granulization theory was wholly untested by and was not generally accepted in the scientific community.

In *Jones*, the government proffered an FBI agent as a cell site analysis expert. The agent would testify about the location of towers that the defendants' phones connected to, the sectors used for each call, and the general location where the phones must have been when they connected to each tower. This testimony was based on his analysis of information provided by telecommunications providers.

The agent made four reports, each of which contained a series of satellite images onto which he plotted the cell towers that witnesses' phones connected to at the beginning and end of certain phone calls. On each map, the agent indicated all of the cell towers in the area with red dots. He then indicated the cell tower to which the phone connected and the specific 120° sector of the tower that was used for the call. The 120° sectors were indicated by pie-shaped wedges extending out from the cell tower. Each map also had a brief description of what could be gleaned from the phone calls shown on that map. The agent based his maps on the combination of two sources: (1) the call records of the cell phone companies, which identify the particular tower and sector the phones connected to at the beginning and end of each call, and (2) cell tower lists provided by the cell phone companies, which specify the location of their cell towers, including the GPS coordinates for each tower and the direction that the sectors point for those towers.

The defendant argued that the testimony should be excluded because the agent's methodology for determining the direction and size of the pie-shaped wedge was unreliable. He also argued under Rule 403 that the pie-shaped wedges would mislead jurors into believing that the location of the phone was more precise than it actually was.

Preliminarily, the court found the agent to be qualified as an expert and that the testimony about how cell towers worked and the general location of the cell phones involved would be helpful to the jury. It then found that the testimony was the product of reliable principles and methods. To the extent that the testimony relied on assumptions about strength of signal from a given tower, any challenges to those assumptions went to the weight of the testimony, not its admissibility.

To avoid the danger of unfair prejudice from the pie-shaped wedges, the trial court ordered that the arcs used to depict the outer limit of the wedges on the chart would need to be removed so that the wedges would appear as open-ended V shapes.

Finally, the court ruled that it did not need to hold a *Daubert* hearing before admitting the testimony because “[t]he use of cell phone records to locate a phone has been widely accepted in both federal and state courts across the country.”

Now back to our case. We argued that *Evans* and *Jones* supported the admission of the testimony in our case. First, it was analogous to the testimony permitted in *Evans*. Our expert was not going to estimate the location from which the defendant made phone calls or sent text messages. Rather, she would testify concerning the general operation of cellular networks and the location of the towers that the defendant’s phone used. In addition, the *Jones* court noted the broad acceptance of cell site evidence and recognized that factors affecting cell signal strength may go to the weight of the expert’s testimony and support cross-examination, but did not make the evidence unreliable.

We also detailed the other evidence that corroborated the proposed testimony, including other witnesses’ statements, the location of the victim’s body, and DNA and fingerprint evidence. We argued that where the ultimate issue is the reliability of the evidence, the court should consider that other evidence corroborates, but does not duplicate, the proposed testimony.

The trial court apparently agreed with us because it denied the motion without comment.

What about appellate remedies?

It needs to be a special action. The only way we could appeal under section 13-4032 would be by way of a cross-appeal. A.R.S. § 13-4032(3). And that doesn’t help if we lose at trial.

It is best to win at the trial court – the standard of review is abuse of discretion. *State v. Bernstein*, __ Ariz. __, __, ¶ 10, 317 P.3d 630, 635 (App. 2014). But if you lost at the trial court, you can still win if you have a good enough record. The biggest challenge in a special action about expert testimony is explaining an abuse of discretion in what can be a fact-intensive question. You will need to be your most articulate and convincing to win.

Recent Rule 702 cases:

***State v. Salazar-Mercado*, 232 Ariz. 256, 304 P.3d 543 (App. 2013), review granted (Feb. 11, 2014):**

This was a child abuse case in which Dr. Wendy Dutton testified as a “cold” expert to explain the general characteristics of child victims of sexual abuse. The defendant tried to preclude the testimony under Rule 702 but the trial court admitted it. He raised several arguments on appeal.

First, the defendant argued that, because Dr. Dutton testified as a “cold” expert without “any knowledge or information about” the facts of his case, “nothing that she testified to [was] directly applied.” Thus, he argued, she could not have “reliably applied [her] principles and methods to the facts of the case,” as required by Rule 702(d). He contended that Rule 702(d) excludes experts who do not apply their methods to the facts of the case. The court looked to Federal Rule 702 and rejected this argument. The Rule “does not alter the venerable practice of using expert testimony to educate the factfinder on general principles.” Rather, for this “generalized” testimony to be admissible the rule “simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony ‘fit’ the facts of the case.” The court adopted the federal approach and held that Rule 702(d) “does not require the per se preclusion of an expert who provides general testimony without applying her principles and methods to the facts of the case. Rather, in that circumstance the court should consider whether the testimony ‘fits’ the facts of the case. That is, whether the proffered testimony assists the jury ‘by providing it with relevant information, necessary to a reasoned decision of the case.’”

The defendant also argued that Dr. Dutton’s testimony did not meet the requirements of Rule 702(a)-(c). He claimed that the testimony was “not based on sufficient facts or data” because it “consisted merely of generalizations of how abuse victims behave.” The court responded that Rule 702 does not prohibit testimony simply because it is “general.”

He next claimed that the testimony was not the product of reliable principles and methods because it was “based on various research studies and [her] experience.” He complained that Dr. Dutton’s testimony “could not objectively be evaluated for known or potential rate of error.” However, Rule 702 is “not intended to prevent expert testimony based on experience.” And Daubert does not require a court to evaluate all expert testimony for “known or potential rate [s] of error.” Rather, Rule 702 is “flexible” and suggests that the “rate of error” factor should be relied upon only to the extent it is relevant.

Finally, the court rejected the argument that Dutton’s testimony could not assist the jury because nothing she said applied to this case. Our supreme court has held that expert testimony on general patterns of behavior “may well aid the jury in weighing the testimony of the alleged child victim” because the average juror is not “familiar with the behavioral characteristics of victims of child moles[tation].”

***ASH/ACPTC v. Klein*, 231 Ariz. 467, 296 P.3d 1003 (App. 2013):**

In this SVP case, the Court of Appeals held that Rule 702 applies to testimony by a mental-health expert at an SVP discharge trial. It also ruled that the trial court did not abuse its discretion in ordering a hearing to take evidence about the admissibility of the testimony.

It agreed that Daubert does not set a rigid checklist for admissibility, but that the trial court must exercise its discretion to determine the reliability and relevance of expert mental-health testimony offered in a discharge hearing by considering factors such as the facts, data, theories, and methods underlying the expert's opinion.

***State v. Delgado*, 232 Ariz. 182, 303 P.3d 76 (App. 2013):**

Delgado was convicted of aggravated assault for strangling his girlfriend. At trial, the court allowed the State to present testimony from a medical doctor, Dr. Salik, about whether the victim's injuries were consistent with being strangled.

Before trial, Delgado filed a motion to preclude Salik's testimony as a "strangulation expert" under Rule 702. The court denied the motion, finding that Salik was qualified to testify based on his medical training and experience. On appeal, Delgado argued that Salik's testimony "did not help the jury determine any issue, . . . w[as] not based on sufficient data," and did not apply "reliable principles or methods." The Court of Appeals disagreed.

First, Delgado argued that Salik had "no specialized training in strangulation" and said that his experience was insufficient because it was limited to taking patient histories regarding strangulation when treating trauma injuries. The court explained that whether a witness qualifies as an expert is construed liberally, and that a court should not exclude testimony simply because the witness does not have the specialization that the court considers most appropriate. If an expert meets the "liberal minimum qualifications," her level of expertise goes to credibility and weight, not admissibility. In this case, Salik was qualified as an expert. His CV showed that he was a medical doctor with extensive experience working in emergency medicine and had "expertise on the physical process a body undergoes during strangulation." And Delgado conceded that Salik "sees a lot of trauma cases and emergency room issues."

Next, Delgado argued that Salik's testimony was not helpful to the jury because a person need not be a doctor to listen to a person's allegation (which may not be true) that she has been strangled. He noted that expert testimony is not admissible the expert does not rely on any specialized knowledge when forming an opinion and, therefore, "is in no better position" than the jury. The court rejected this, observing that Salik's testimony was based on his specialized knowledge as a medical doctor, including his relevant experience treating patients. It noted the comment to Rule 702 that the Rule was not intended to "preclude the testimony of experience-based experts." And the testimony was useful to the jury because an ordinary juror does not have the same ability to assess injuries and histories as a doctor who is trained in respiratory physiology and who has experience treating reported incidents of strangulation.

Whether patients accurately report the cause of their injuries goes to the weight, not admissibility, of the testimony. Doctors can reasonably rely on patient's reports, even if those reports may be inaccurate. That possibility can be explored on cross-examination.

Finally, Delgado argued that Salik's testimony would invade "the province of the jury" because he would "in essence" be "an expert on [the victim's] credibility." He argued this because the doctor has to rely on the patient's own report to determine whether she was actually strangled. But, in this case, the State did not ask the doctor to make a definitive determination the she had been strangled, but to state whether her injuries were consistent with being strangled. The testimony was admissible under Rule 702.